No. 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

DAVID W. BELDING AND OTHERS,
PLAINTIFFS,

vs.

CHARLES HEBARD,
DEFENDANT.

WILLIAM R. HOPKINS AND OTHERS,
APPELLANTS.

vs.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,
APPELLEE.

SUPPLEMENTARY BRIEF OF WILLIAM R. HOPKINS AND OTHERS, PETITIONERS AND APPELLANTS.

C. B. MATTHEWS,
Attorney for W. R. Hopkins and Others.

F. J. HEER PRINTING CO., Law Printers, 72-80 E. Third St., Columbus, O.

INDEX.

Cases Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 232.

DAVID W. BELDING AND OTHERS,

PLAINTIFFS,

vs.

CHARLES HEBARD,

DEFENDANT.

WILLIAM R. HOPKINS AND OTHERS,

APPELLANTS.

vs.

THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY,

APPELLEES.

SUPPLEMENTARY BRIEF OF WILLIAM R. HOPKINS AND OTHERS, PETITIONERS AND APPELLANTS.

The Court of Appeals in deciding this case below against the bill of review, passed upon only one question, finding that sufficient for its judgment. The case is reported in 194 Fed. Rep., page 301.

On page 310, the majority of the court says (after discussing at some length the question of purchase in good faith by the Smoky Mountain Company):

> "What we do mean to decide is that in our opinion, taking into account not only the speculative purchase by appellants, but the good faith purchase by the Smoky Mountain Company, a case is not presented which appeals to the equitable discretion of the court to allow the review of the decree upon the ground alone of newly discovered evidence. We rest our decision solely upon this proposition."

There is one rather astonishing statement in this. There is not one item of testimony showing, or tending to show, that the appellants made a speculative purchase, or that the purchase by the Smoky Mountain Company was any more in good faith than the other. We could have had available plenty of testimony to contradict the speculative nature of the title by the appellants, but if we had offered it, upon the rules of evidence, it would not have been admissible, because the purpose for which the appellants purchased the property is of no moment whatever. Usually people buy property to make money out of it, and what the court below means by the word "speculative," judging from the evidence in this case, nobody can fathom.

It is true the court discusses the subject of an assignee filing a bill of review, but only academically. That question has been argued fully in the original brief filed in this case, but we desire to call the attention of the court to the fact that seems to have been ignored by the majority of the court in deciding the case, to wit, that the original application was to file a bill in the names of the original parties and that kind of a bill was in fact filed.

After the decision on this bill of review by McCALL, J., in the United States Circuit Court at Knoxville, a petition for an appeal and assignment of errors were filed, and in both of these, by the express wording of them, the appeal was taken in the names of the original parties. The title of William R. Hopkins and his associates was derived from a deed made prior to the final decree in the original case. The deed of the Lumber Company was merely a quitclaim deed, and while the court remarks that a quitclaim deed may make a man an innocent purchaser, yet this deed did not have that effect, unless you judge merely from the deed itself. The court seems to have determined that because a quitclaim deed may have such an effect, as a matter of law this deed did have that effect; not as a question of fact, because there was no evidence other than the deed itself.

With regard to this matter of an assignee intervening, the Lumber Company itself is an intruder, but its intrusion was applied for by it and granted by the court, and these appellants made no objection and it went along thereafter as if it were a contest between the real parties in interest at the time.

In,

Leggett v. City of Detroit, 137 Mich., page 247,

it is said:

> "Answering to an original bill in the nature of a bill of review filed by a person not a party to the suit waives the right to appeal from the order allowing such bill to be filed. It seems quite evident that the appellee cannot complain of a state of affairs that it had brought about by its own action in the case."

In relation to the only point decided by the Court of Appeals, we have to say that we have examined the authorities upon which the court based its right to use its discretion against the appellants, not only all of the cases that are cited by the court in support of that proposition, including Section 417 of Story's Equity Pleadings, but also all of the authorities cited under that section, and have included herein a short statement with reference to each case. If there is any one thing that is noticeable by its absence from those authorities, it is that a subsequent private sale by a successful party in a litigation is any element in determining whether a bill of review should be allowed to be filed, or in determining its effect after it is filed. The only possible exception is where the very object of the suit was to dispose of the property; in other words, where the suit was in rem and the sale has been a judicial sale. Even in that case, the fact of the sale is only regarded as one element in passing upon the application, and has, as far as my knowledge extends, never been used as an isolated fact and alone, separated from informality in the papers or laches, or immateriality of the matter, to rule the question.

The sanctity of judicial sales and the great protection extended to them, are shown in the case of

Grignon v. Astor, 2 Howard, 319,

and in the subsequent cases of

Florentine v. Barton, 2 Wallace, 216,
Comstock v. Crawford, 3 Wallace, 396.

Of the authorities cited in

2 Daniels' Chancery Practice, 1577,

which text book is in turn cited in Story's Equity Pleadings, Section 417, we will say nothing further, because we

examined those in the original brief and commented upon them.

The case of,

Dunfee v. Childs, 59 W. Va., 239,

heretofore apparently much relied upon by the counsel for the Smoky Mountain Company, is a case where an application to file a bill of review was based upon two grounds. First, an error of law in not granting the applicant's motion to stay the proceedings in the original case pending an appeal, which appeal covered the very same errors, and when another application for a bill of review covering the same matters was pending and undisposed of. (page 234). Second, upon alleged newly discovered evidence, where it turned out that the newly discovered evidence was the fact that the Supreme Court of Appeals on the appeal mentioned reversed the original decree. Of course this application was denied. It was a case of judicial sale.

Rickey v. Powell, 100 U. S., 104.

Upon a bill of foreclosure against A. and the parties to whom, after mortgaging the land, he respectfully conveyed separate parcels thereof at different times, the only question raised was as to the order in which the court should direct the parcels to be sold to satisfy the debt. From the decree rendered June 5, 1875, finding the sum due and prescribing such order B, one of the defendants, appealed. The decree was affirmed. Thereupon C, another defendant, filed a petition below, May 21, 1879, for leave to file a bill of review for alleged errors of law, being the same as those passed upon by this court on the appeal and for newly discovered evidence; but although the decree was in full force, he neither offered to pay the same, nor any part thereof, nor alleged any reason for not doing so. Held, that leave to file the bill

rested in the discretion of the court below, and was properly refused.

In the opinion, page 109, it was held that as to the errors of law the application was too late. As to the newly discovered evidence, the court held that the refusal of the court below to permit it to be filed should be affirmed solely on the ground that is mentioned in the syllabus. This was a case of judicial sale.

Virginia Iron Co. v. Roberts, 103 Va., 661.

This is a case cited by the Lumber Company in this case and relied upon on the subject of filing a bill of review. The court on page 674, says:

> On September 15, 1903, complainants filed what they called a bill of review to the foregoing decree of April 11, 1903. In this bill of review they set forth at great length all the previous proceedings but alleged no new matter whatever except that they had discovered that the case of Hunsucker v. Spear had in 1898 been removed to Russell county and had never been transferred back to Wise county, and that therefore the orders entered by Irvin, special judge, in 1899 and 1902, were void for want of jurisdiction. This application was demurred to and also a plea was filed in which it was alleged that all of the parties had agreed to the entry of said order of transference and supposed such decree had been entered. This plea was held upon the evidence to be true, and the court found that there was no ground on the merits for a bill of review. Thereupon the complainants dismissed their bill of review and took an appeal from the order of the court.

Wilson v. Webb, 2 Cor. 3.

In this case the syllabus of the court reads:

> "It is in the discretion of the court to give leave to file a bill of review on the discovery of new evidence,

It was refused in this case as it tended to deprive creditors of payment of their just debts."

The opinion of the court on page 4, reads:

"I confess the circumstance which strikes me as the strongest to prevent the court listening to this application is the character and situation in which these parties stand. Here has been a decree for sale of an estate to satisfy fair creditors whom it was the clear intention of the father to satisfy when he subjected his real estate to their claims, and if he had known that any part of that estate had been entailed, he had it in his power to have made himself tenant in fee by suffering a recovery, which he probably would have done if he had forseen the necessity of it. It is admitted that it is in the discretion of the court whether or not to admit such an application as this. Now, if this is such a case as calls for our particular favor, fair creditors may be defeated by it, and therefore without depriving a party of any legal advantage, surely the court will not be anxious to give him any assistance in bringing about such an end."

In this case it appears that prior to the subjection of the property to the payment of debts, the property had been entailed, but the deed of entail was not discovered for some time after the decree of the court, but all the time it was in the possession of the attorney of the party making the application, but apparently without his knowledge of its contents. This case was also one of a judicial sale to pay debts.

Bennett v. Lee, 2 *Atkins*, 528.

This is a case also where the parties after a decree discovered a deed of entail. On page 530, the chancellor says:

"Now it appears to me plainly that he was acquainted with this (the will) antecedent to the pub-

lication of the case, but that the will was known to him was admitted by himself in his answer and taken notice of in the bill itself, but it was claimed that he had no notice of the right under the will; but it was held by the court that he should have known."

The court in its opinion on page 534, says:

"The third ground is that the matter came to his knowledge subsequent to the master's making his report."

The court says:

"And this is a proper ground for a bill of review, supposing the evidence came up to it, but it turns out quite otherwise. This being so, the petition must be dismissed."

Young v. Keighley, 16 Vesey, 348.

On page 354, the court says:

"(Lord Eldon) As far as I can ascertain what the court permits with regard to bills of review upon facts newly discovered, the decisions appear to have been upon new evidence, which if produced in time would have supported the original case, and are not applicable where the original cause does not admit the introduction of the evidence as not being put in issue originally, especially where enough appeared upon the original and supplementary bills to call upon the plaintiff using reasonable diligence to bring forward the whole case; but this application proposes new evidence in support of a case not upon the record which might have been put upon the record."

Perry v. Phelips, 17 Vesey, 173.

On page 178, the court will observe that the discretion on this latter page relates to the form in which the remedy was sought to be invoked, but that was passed over by the

Lord Chancellor and he considered the case upon the merits.

In this case, the court's opinion practically discusses only a question of law as to the effect of a will which was in issue originally, and remarks upon the whole "the clear conclusion is that I could not vary this decree dismissing the bill if it was before me upon a proper bill of review."

Ord v. Noel, 6 Maddocks, 127.

The syllabus in this case reads as follows:

> "To entitle a party to file a supplementary bill in the nature of a bill of review, it is necessary that the new matter should be discovered after the decree, or at least after the time when it could have been introduced into the cause, and the matter should not only be new but material, and such as if unanswered in point of fact would clearly entitle the plaintiff to a decree, or would raise a question of so much nicety and difficulty as to be a fit subject of judgment in a cause."

This was a case where it was alleged that the existence of certain deeds had been discovered. The court in winding up its opinion, says:

> "The more it is examined, the more it will be found that these newly discovered deeds and dealings with third persons, in which the plaintiff was neither party nor privy, cannot be material to the plaintiff's case and cannot affect the decree."

On page 130, it would appear that the plaintiff had discovered the contents of the deed before the cause was finally heard, but it seemed that neither he nor his advisors appreciated their importance.

Partridge v. Usborn, 5 Russell, 245.

In this case the court refused to dispense with the rule that the applicant must perform the decree sought to be opened, before his application, and hence the application was denied.

Taylor v. Taylor, 1 McN. & G., 405.

In this case there was a motion to strike a certain paper from the files, assuming that it was intended to be a bill in the nature of a bill of review. The court held that it was not such a document and denied the motion.

Hodson v. Ball, 11 Simon, 456.

In this case a bill in the nature of a bill of review was stricken from the files because no leave had been obtained to file it.

Bank v Dundas, 11 Ala., 661.

In this case there had been a bill filed to foreclose a mortgage, wherein one of the questions involved was the order in which certain parcels of property should be sold. It was held that as the testimony established that the land had been constantly depreciating in price if not in value, since the sale; it being a judicial sale, it was not just or equitable again to direct a sale conceding the report to be erroneous, as this would be to expose the bank to probable, if not certain loss, when it has been guilty of no fault and the necessity had been caused by the gross neglect of the party asking a re-sale. That in such a case, the Chancellor in the exercise of a sound discretion should refuse to permit the bill to be filed.

Massie v. Graham, 3 McLean, 41.

This application was not made until twenty years after the decree. The court, on page 52, says:

> "The grounds on which this application rests have been examined with some minuteness, and with the exception of the first one which is obviated by a remittur, there is no clear and satisfactory evidence of payment to any amount having been made on the mortgage. Indeed, in every instance the presumption is rather against such payment. If on such evidence, after the lapse of more than thirty years, the parties all being dead, a decree should be reviewed, great mischief would result. The application for leave to file the bill is overruled."

It would appear from the opinion of the court that the action was one to foreclose a mortgage to sell the property to pay a debt, and therefore it is a case of a judicial sale, and an examination of the merits found that the evidence alleged to have been discovered did not support the contention.

Wood v. Mann, 2 Summer, 316.

In this case Judge STORY held as stated in the syllabus, as follows:

> "The court may in the exercise of a sound discretion allow the introduction of newly discovered evidence of witnesses to facts in issue in the cause after publication and knowledge of the former testimony, and even after the hearing. But it will not exercise this discretion to let in merely cumulative testimony. The same rule holds in cases of bills of review and supplementary bills in the nature of bills of review, semble that the rule ought to be confined to cases of the discovery of new evidence of a documentary nature and the testimony of witnesses necessary to substantiate this."

On page 335, alluding to the claim that the evidence was merely cumulative, STORY, J., says:

> "I am not able to satisfy myself that this objection to the evidence is not well founded; on the contrary, the more I reflect, the more I feel the difficulty of the admissibility of merely cumulative and corroborative testimony, though newly discovered, to the facts in issue. If I were to decide in favor of its admissibility, I should as far as I know, be the first judge who ever acted upon so broad a doctrine. I am not bold enough to venture upon such a course. On the contrary, if I were called upon to frame a rule, it would be to exclude all testimony of newly discovered witnesses to any facts in issue unless connected with some newly discovered document. There is no authority in favor of the petition. There is authority against it."

It seems to have been admitted that the testimony was cumulative but that it was newly discovered but not of a strong nature.

Thomas v. Brockenbrough, 10, Wheat., 146.

In the last paragraph of the opinion in this case, the court says:

> "In this case the court below decided in the original cause that the title to the land in controversy was vested in the heirs of John Harvey and decreed the appellant to convey the same to them. If Thomas then had no title to the land, of what consequence was it to him that the conveyance was decreed to be made to all the complainants in that cause as being the heirs of Harvey rather than to two of them, who he alleged were entitled to the land as devisees? If they did not complain of the decree (and that they did not is proved by their plea and demurrer to the bill of review) and if the plaintiff in this appeal was not injured by it, the court is at a loss to conceive upon what legal or equitable ground that decree could have been reversed for the heirs growing out of the after discovered evidence. These observations

apply equally to the second and third errors assigned. All of these grounds related to the same matter."

The case of Dexter vs. Arnold, 5 Mason, at page 315, speaks of the fact that leave to file a bill of review is discretionary with the court, but at pages 317-319, the reasons for denying leave in that case are explained.

The petition in the case for leave did not state the nature of the evidence newly discovered, by whom it was expected to be proven, or when the new facts were discovered.

The court in the examination of each ground, holds that they were not germane to the original case or else that the evidence was originally accessible.

On page 309 of that same report:

"To support that proposition the following authorities are relied upon:

2 Daniels' Chancery Practice, 1577;
Story's Equity Pleadings, Sec. 417;
Hughes v. Jones, 2 Md. Ch., 289-296;
Harris v. Edmondson, 3 Tenn. Ch., 211;
Bank v. Dundas, 10 Ala., 661-669;
Massie's Heirs v. Graham's Admr., 3 McLean, 41;
Craig v. Smith, 100 U. S., 226-233;
Ricker v. Powell, 100 U. S., 104-107;
Thomas v. Harvie's Heirs, 10 Wheat., 146-150;
Stockley v. Stockley, 93 Mich., 307-313."

In Story's Equity Pleadings, Sec. 417, this is said:

"In the next place, there is another important qualification, which is indeed deducible from the very language of Lord Bacon's ordinance; and that is, that the granting of such a bill of review for a new-discovered evidence, is not a matter of right, but it rests in the sound discretion of the court. It may, therefore, be refused, although the facts, if admitted, would change the decree, where the court, looking to

all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable."

The cases in,

10 Ala.;
3 McLean;
100 U. S., 94;
10 Wheaton, 146,

have already been commented on above. The remaining cases are

Hughes v. Jones, supra.

In this case the court held that the matter on which a bill of review is grounded must be new and due diligence must be used to discover it, and that laches or negligence will destroy the right to relief. This case had been pending for eleven years. A great amount of testimony had been taken and by consent the case was submitted to the court and fully argued. The witness whose newly discovered testimony was sought to be introduced, lived in the family of an uncle of the party making the application for more than six years and did not remove from the county where the cause originated until long after the pendency of the suit, and since that time had resided in Baltimore. Furthermore, the petition did not state that by the use of reasonable diligence the knowledge of the new matter might not have been acquired in time to be used when the decree passed and upon this last ground the application was denied.

In *Harris v. Edmondson*, 3 *Tenn. Ch.*, 211, the application was grounded upon the discovery of certain receipts for payments. This application was denied because, the

court says, (page 215) "if these receipts had been in the original case, they would not have changed the general result."

In *Craig v. Smith, Supra*, it appeared that the suit was brought for infringement of a patent. In the original case, the defense was grounded upon public use for more than two years and anticipation, and evidence was introduced upon both of these points. Afterwards the defendant discovered additional public uses and additional anticipations and made some effort to show due diligence in hunting for these without success prior to the entry of the decree. The court which had entered the judgment allowed the bill of review to be filed, heard the case on its merits with the new evidence and set aside the decree and dismissed the bill. The remarks of this court were admonitory, simply stating the general ground that care should be used in allowing them, but affirmed the judgment dismissing the bill, although it seemed that the evidence was merely cumulative, and it is difficult to say why the defendant might not have discovered additional anticipations as they were matters of record at the seat of government.

In *Stockley v. Stockley, Supra*, a bill had been filed to foreclose a mortgage. The defendant employed counsel and an order was made in the case to close the proofs in sixty days. The defendant paid no attention to this order and a decree was taken. Upon application of the defendant, that decree was set aside and defendant was allowed a certain further time to close the proofs, but he paid no attention to this order, and a new decree was entered. After the second decree was entered, a petition for a rehearing was filed, overruled, and then the defendant de-

sired to file a second petition for a re-hearing. This was denied, the judge remarking that the state of affairs was brought about by the defendant's own negligence. The defendant blamed his attorney but failed to prove any fault on the attorney's part.

In Putnam v. Clark, 36 N. J. Equity, 33-36, the application for a bill of review was grounded on the testimony of an alleged newly discovered witness, but the court found that the existence of the witness and the materiality of her testimony was known when the suit was commenced, and the application was denied on account of laches.

Lindblom v. Rocks, 146 Fed., 663.

"In order to obtain protection on the ground that he is an innocent purchaser for value and without notice, a purchaser must have acquired title to the subject matter of his purchase."

Young v. Scofield, 132 Mo., 660;
Wells v. Walker, 29 Ga., 450;

In Vattier v. Hinde, 7 Pet. (U. S.) 270, 8 L. Ed., 675, Chief Justice MARSHALL said that the rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblence of title. In Sampeyreac v. United States, 7 Pet. (U. S.) 222-241, 8 L. Ed., 665, it was said that a grantor can convey no more than he possesses. Lampe, from whom the plaintiff in error purchased, was in no better position to convey the right of possession than if he had held under a forged deed. The doctrine of bona fide purchaser without notice does not apply where the purchaser

buys no title at all. His good faith cannot create title.

Dodge v. Briggs, (C. C.) 27 Fed., 160, 166;
Texas Lumber Co. v. Branch, 60 Fed., 201, 8 C. C. A., 562.

"In addition to this both Lampe and the plaintiff in error held under quitclaim deeds. It is the general rule, that the grantee in a quitclaim deed is a purchaser with notice, and that he takes only the interest of his grantor in the premises.

May v. LeClaire, 11 Wall. (U. S.) 217, 20 L. Ed., 50;
Villa v. Rodriguez, 12 Wall. (U. S. 323, 20 L. Ed., 406;
Baker v. Humphrey, 101 U. S., 494, 25 L. Ed., 1065;
Runyon v. Smith, (C. C.) 18 Fed., 579;
Dodge v. Briggs, (C. C.) 27 Fed., 167;
Gest v. Packwood, (C. C.) 34 Fed., 368;
Baker v. Woodward, 12 Or. 3, 16 Pac., 173;
American Mortgage Co. v. Hutchinson, 19 Or. 334, 24 Pac. 515; Low v. Schaffer, 24 Or. 239, 33 Pac., 678."

In reference to the above cases, the language of Chief Justice MARSHALL in Cohens v. Virginia, 6 Wheat., 264-293, is extremely pertinent:

"General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but not control the judgment in a subsequent suit when the very point is presented for decision."

See also, Wells Fargo v. Johnson, 214 Fed., 180-184.

Lord COKE has said that judicial discretion means "discernere per legem." In other words, judicial discretion is not arbitrary. It must be a discretion bred from a knowl-

edge of the law. It is a little remarkable that in all of the decisions on the question of the bearing of an alleged innocent purchaser upon the question of allowing the bill of review to be filed, or on deciding it if filed, upon the merits, there is no suggestion in any case that a private sale between parties subsequent to a decree has anything whatever to do with the allowance of the filing of the bill, or in the disposal thereof on the merits. Perhaps for the reason that if the purchaser has any rights depending upon an alleged purchase without notice, but not being a party to the suit, he would have to set these up in some separate proceeding. Possibly, if called upon to surrender possession by a delivery order in the original case, he might then seek to uphold his title, but that any innocent purchase by an outsider has nothing to do with the allowance or the decision on the bill of review is quite plain. A person who is entirely innocent himself, who has fought the effort to deprive him and his predecessors of his property by every means in his power, including appeals, and who has by neither word or act estopped himself in any way, certainly stands in as good a position as the purchaser. It is no more inequitable to deprive the purchaser of the price that he put into the property than it is to deprive the real owners of the price that they put into it, and when you add that the original owners were *in fact* the owners, as it now appears, there can hardly be any question about where even the equities reside. Can it be that within the limits of the law a party who has been inadvertently, but nevertheless wrongfully, deprived of his acknowledged property, has no means of righting that wrong because forsooth somebody else may be hurt? This is about as clear a case of putting the apparent mis-

fortune of the purchase of the property entirely above the rights of the owner of the property, who has lost it through no fault of his own, that could be imagined. Protection in equity is supposed to go in accordance with merit, but wherein lies the superior merit of an innocent purchaser over an innocent owner of property who has been deprived of that property by the strong arm of the law against his protest and active defense carried to the utmost limits? Such an outcome ignores all merit and all law.

When such a person seeks to file a bill of review upon the ground of newly discovered evidence, of course it is grounded upon the fact that he had previously known nothing of it and could not by diligence discover it, and therefore he could take no steps to protect the public from purchasing it, and it will be noticed that the majority opinion steers entirely clear of the question of fact involved as to where the state line was located. But Judge SEVERENS, who delivered a dissenting opinion, states that after thorough examination of the new evidence and the old record, the contention that the line went over Hangover Ridge was a hopeless contest. In fact his whole opinion is so able a presentation of what we have contended for in the case, that we append it in full.

It would seem to be conclusively established by the authorities that the discretion of the court spoken of in the general phrases used means upon the merit or demerit of the application for leave to file a bill of review alone, and that relative hardships are not germane to the case.

Respectfully submitted,

C. B. MATTHEWS,

Attorney for W. R. Hopkins and Others.

APPENDIX.

SEVERENS, Circuit Judge (dissenting). For the reasons stated in the following opinion, I am unable to agree with the majority of the court or with the reasoning on which their conclusion is based. Inasmuch as the statement of facts contained in the opinion of the other judges is not, as I think, sufficiently full to disclose the whole case and omits to mention several important facts material to the proper disposition of it, I am constrained to state the case in my own way.

This is an appeal from a decree of the Circuit Court dismissing a bill of review which was allowed to be filed there by the consent of this court given upon a petition filed here August 6, 1907. The decree which was complained of was made by this court on an appeal, July 13, 1900, affirming the decree of the Circuit Court. The reasons which induced this court to affirm the decree of the court below are stated in the opinion by Judge LURTON reported in 103 Fed., 532, 43 C. C. A., 296. The object of the original bill was to obtain an injunction to restrain trespassers on certain described lands alleged by the complainant to be in Tennessee and to belong to him, and to obtain a decree quieting the complainant's title to said lands. The complainant claimed title under a grant from the state of Tennessee. The answer of the defendants averred that the lands were not in Tennessee, but were in North Carolina, and claimed title in themselves under grants from the latter state. The lands lie along the boundary line between the two states, and the question

was which of the two lines claimed by the respective parties to be the boundary was the true boundary line, for the lands in controversy lie between those lines. This was the sole question in controversy. The regularity of the derivation of the titles was not disputed on either side. The following excerpt from the statement of facts prefacing the opinion of the court will explain the history of the respective grants, the steps which had been taken by the public authorities of the two states to ascertain and settle the boundary line and the character of the lands in controversy:

> "The territory now comprising the state of Tennessee, was ceded by the state of North Carolina in 1789 [2 Ired. & B. Rev. St. p. 171] to the United States. The Session Act describes the eastern boundary line as follows: 'Beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of the said mountain to the place where the Wautauga river breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's road crosses the same; thence along the ridge of said mountain, between the waters of Doe river and the waters of Rock creek, to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to where Nolichucky river runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of the said mountain to the Painted Rock, on French Broad river; thence along the highest ridge of the said mountain to the place where it is called the 'Great Iron' or 'Smoky' Mountain; thence along the extreme height of the said mountain to the place where it is called 'Unicoy' or 'Unaka' Mountain, between the Indian towns Cowee and Old Chota; thence along the main ridge of the said mountain to the southern boundary of this state.' The line here to be ascertained is included within the call beginning 'thence along the extreme height of the said

mountain to the place where it is called Unicoy or Unaka Mountain.' The mountain whose extreme height is to be followed until Unaka Mountain is reached is the 'Great Iron or Smoky Mountain.' The necessity for a definite location and marking of the line became evident to both states, and in 1821, under acts passed by each state, a joint commission was appointed for the purpose of settling, running, and remarking the boundary line. The Tennessee commissioners were appointed under an act which provided that the commissioners should 'settle, run and remark the boundary line between this state and the state of North Carolina, agreeably to the true intent and meaning of the said act of the General Assembly of the State of North Carolina, entitled: "An act for the purpose of ceding to the United States of America certain western lands therein described."' Acts Tenn. 1820, c 22 [2 Scott's Laws, p. 635]. The North Carolina act, providing for the running of the line, was substantially identical with the Tennessee statute above set out. 2 Ired. & B. Rev. St. N. C., p. 94. The joint commissioners did run and re-mark the line, and each state passed an act ratifying, confirming, and adopting the line as run and reported by the commissioners. Acts Tenn. 1821, p. 45, c. 35; 2 Ired. & B. Rev. St. N. C., p. 96."

It will be sufficient for the present purpose to state that the line run by the commissioners as claimed by the plaintiff in the original suit would be a line starting from a known point where the disputed lines separate northeast of the land in controversy and extending southwardly and somewhat westwardly over what is known as Hangover Rock to another known point where the disputed lines converge. If this were the true line, these lands lie in Tennessee. The line which the defendants in the original suit claimed was the one run by the commissioners starts from or near the same point as the other, but diverging therefrom extends more to the right, as one looks to the south-

west, and passes over the Fodder Stack range of heights to the converging point. This line lies west of these lands and would locate them in North Carolina. The evidence in the original case showed that there were signs and marks along each line, the character of which is stated in Judge LURTON's opinion on the original case. On the Fodder Stack ridge line there were 11 trees marked like those on the general and undisputed line established by the commissioners. This court thought the probability was that these trees were thus marked by the commissioners, but concluded that this line was only temporarily run, and was afterwards abandoned, and the Hangover Rock line substituted. We need not go into the various reasons which led the court to conclude that the Hangover Rock line was the true boundary line. The necessary result was that the land in question passed by the Tennessee grant, and that, therefore, the complainant was the true owner; and the court decreed accordingly. Counsel for the defendant remind the court with great earnestness of the importance to the public of the stability of judgments. But it is of even higher interest to the public that the citizen shall not be despoiled by a wrong judgment. It is for the prevention of such unjust consequences that the law gives to the courts the power of correction by a bill of review. It is an ancient principle of equity that, if a man shall lose his property to his adversary by the decree of the court, he still retains the right to regain it, if, by subsequent discovery of hitherto unknown proof bearing directly on the issue, he is able to convince the court that its decree was clearly wrong. This right is one to which the right acquired by the decree is subordinate, and neither the opposite party nor any one claiming under him

can successfully deny that right, so long as the true owner has done no act either of commission or ommission, whereby he should be estopped from claiming it.

When the former suit was pending nothing of the work of the commissioners was to be found in the archives of either state, although diligent search was made. The state house of North Carolina at Raleigh was burned in 1831, and its archives nearly all destroyed. But what had become of the report of the commissioners which came to the state of Tennessee no one could explain. The court had only scant means for locating the line, and was in doubt about the conclusion to be drawn from what it had, but based its judgment upon the probabilities as they seemed to be. But about the beginning of the year 1904 and after the three years which a statute of Tennessee prescribes as a limitation for bills of review had elapsed, the report of the commissioners and the map which accompanied it belonging to the state of Tennessee were discovered in a barrel of rubbish in the basement of the capitol of the state at Nashville, which the state authorities had ordered to be cleaned out. The rumor of this discovery spread abroad and came to an agent of the defendants residing in North Carolina. The grants of these lands by the state of North Carolina were made upon sales made during the years 1853, '54, '55, and '56. That by the state of Tennessee was made in 1892, and probably was at a time subsequent to the time of the disappearance of the commissioners' report and map. I say "probably," because it is hardly to be credited that the official who had charge of the making of the grant would have allowed it if he had knowledge of the action of the commissioners. But it is possible that the making of this grant was the result of

the seemingly loose practice of the land department of that state which is stated thus by Judge CARUTHERS in State v. Crutchfield, 3 Head (Tenn.) 113, at page 115:

> "The state does not warrant the title to the land which she grants. She opens her offices, and permits individuals to enter, at their own risk, any lands they choose, and she issues her grants. They must beware of the titles they get."

The lands were wild, rough, and uncultivated, and almost unsettled, and were valuable mainly for their ore mines and timber.

The state of Tennessee at one time caused a survey and sectionizing to be made of lands in this locality. Of this survey Judge CLARK in his opinion in the original case said:

> "That the state has through the Ocoee District commissioners established its line on Slick Rock creek, and has sectionized all the territory supposed to belong to the state."

This survey and sectionizing took place in 1836, and Slick Rock creek is on the line running over the Fodder Stack range. Aside from the making of the grants, neither state had made any distinct claim of territorial dominion. Taxes have been assessed upon them by the state of North Carolina, and they have been paid by the appellants or their predecessors in title. And recently the appellees have paid taxes to the state of Tennessee. The complainant in the original suit alleged that he was in possession, but this statement was not supported by the evidence. Judge CLARK, in the opinion on which he based his decree, said:

> "After careful consideration of this case, I reach the conclusion that I am not warranted upon the facts

> in differing from the commissioner in the view which he takes of the case. It is a very close one on the facts, and the equity of the case is rather with the defendants in view of the fact that they obtained their grants earlier, and have been paying taxes upon the property while the plaintiff's grant was only recently obtained."

The report and map of the commissioners above mentioned were put in evidence in the court below in this proceeding, and are now before us. The authenticity of them is not disputed. The map shows the line run by the commissioners in distinct color, and it shows the line as it was contended to be by the defendants in the original case, and is the line running over the Fodder Stack ridge, and is on the line of the 41 marked trees above mentioned. The inevitable conclusion is that the original decree was erroneous. The appellees contend vigorously that these documents are not conclusive, and still insist that the true line runs over by Hangover Rock. But it is, as I think, a hopeless contest, and my conviction that the map shows the true line is in no wise shaken. What is the result of this conclusion if it is correct? It must be that these lands lie in North Carolina, that the appellees had no title, and that the appellants are the lawful owners of them.

Counsel for appellants urge that, where it is found that the lands are not within the territorial limits of Tennessee, the jurisdiction of the Circuit Court fails, and that the order should be that the bill be dismissed on that ground. This objection was presented to the Supreme Court in boundary cases at an early day, and was overruled, the court being of opinion that, if upon the allegations of the bill the land is within the territorial jurisdiction of the court, that is enough, and that its authority

will not be divested by its final conclusion that the land is located in an adjoining state. Fowler v. Miller, 3 Dall., 411, 1 L. Ed., 658; New York v. Connecticut, 4 Dall. 1, 1 L. Ed., 715; Handly v. Anthony, 5 Wheat. 374, 5 L. Ed., 113; Rhode Island v. Massachusetts, 12 Pet., 657, 726, 727, 9 L. Ed., 1233; Howard v. Ingersoll, 13 How., 381, 14 L. Ed., 189.

On the merits the conclusion above stated is fatal to the claim of the appellees. The bald, but perfectly true, state of the case is this: The real owners of the property have defended it against a claimant having in truth no interest in it by all the lawful means available to them, but by the adverse decision of the court the owners have lost it. The court has been the instrumentality by which this grievous miscarriage had been accomplished. It does, indeed, sometimes happen that by error or accident such injustices is done and is irremediable; but it certainly ought not to happen by the conscious act or omission of the court while it yet has the power and opportunity to prevent the mischief.

The only question in the case at the original hearing was that of the location of the boundary line between the states. The new evidence seems to be conclusive of that question. It is difficult to conceive of a case more suitable for the remedy now invoked.

But the appellees, apprehending that perhaps the court would come to the foregoing conclusion in respect to the boundary line upon the new facts, interpose a great variety of objections to the relief prayed, among them these: First, it is urged that these complainants are not persons aggrieved by the original decree; and, further, as they contend, the parties in whose behalf the bill of review is

29

filed are assignees, in whose favor the court will not review the decree. These contentions are directed to the ultimate question, namely, whether they have any interest affected by the decree which entitles them to the relief which they seek. The first of these, that these complainants were not aggrieved, does not merit prolonged discussion, certainly not, if this bill is to be treated as a bill by the original defendants as I think it should. The second, concerning the rights on such a bill, is more serious, and is the principal ground as I understand on which the court is to affirm the decision of the court below. The general rule is stated by the Lord Chief Baron Gilbert in his book on the Chancery Practice entitled Forum Romanum at page 186, which is this:

> "None but parties and privies, such as heirs, executors, or administrators, can have this bill of review, since nobody else can be aggrieved by such decree because it can only be revived upon such privies."

Mr. Justice Story in his work on Equity Pleadings, note to section 409, in quoting this language uses the word "by" instead of "upon" in the last line. But I suppose this is an error, as the original publication has it "upon." This rule has been stated and followed in many judicial opinions, and is no doubt the foundation of the practice of the court. Some qualifications to its generality, however, have been made where the special circumstances require it, which is an incident to all general rules. And Mr. Justice Story in the note above mentioned says: "This language is very broad, and requires qualification." And he proceeds to state several of such.

The majority of the court treat this bill of review as one brought by assignees, and not as one brought by the

parties to the original decree to enforce their own rights. While it is true that the petition filed in this court for permission to make application to the Circuit Court for leave to file it was presented by the "assignees," as we will call them, the bill which was allowed by the Circuit Court to be filed is the bill of the original defendants themselves as complainants, and they pray in their bill that they may be allowed to file it. The case stated is the case of those parties. The relief prayed is in their own behalf, and the bill is signed by their solicitors. No statement of any facts in behalf of any other persons than themselves is made—nor, indeed, is there any reference to the rights or interests of any other person. They thus became parties to the suit, and subject to the jurisdiction of the court, and would be bound by the decree which the court should render. The discretion of the Circuit Court as to whether leave to file should be granted was invoked and exercised and at no time was its permission to file the bill recalled. Nor does the fact that the other parties assisted in the promotion of the suit constitute an objection. They had an interest which they might subserve without censure.

It would seem from the rule approved by the Supreme Court upon the authority of the Lord Chief Baron Gilbert's book that the original parties and their privies by representation who were bound by the decree are the only ones properly joined in the suit. Thompson v. Maxwell, 95 U. S. 397, 24 L. Ed. 481; Gies v. Green, 42 Mich. 107, 3 N. W. 283. Nevertheless, a purchaser subsequent to the decree was allowed to intervene as defendant.

But, passing by this objection for the present, I proceed to inquire whether the parties complainants are so affected by the original decree that they are entitled to

maintain a bill of review. The original defendants are aggrieved because the decree cut them out of the interest they had in the lands subject to the deed in trust to Archer and McGarry, and so affected the value of the title conveyed in trust as to materially depreciate the price that could be obtained for it, and the extent to which their debt would be paid. This deed in trust was made pendente lite. The deed of the trustees was offered in evidence by the defendant, and is therefore evidenced of any disserving statements made in it. 1 Wharton's Evidence, § 619. Turning to the deed itself, it appears to have been given to carry into effect certain trust agreements entered into before the making of the final decree. It was of these and other lands to secure a large indebtedness, a very considerable portion of which was due to Archer, one of the trustees. It contained a power of sale, the power being coupled with an interest, and was irrevocable. The good faith of the transaction is not questioned. It was therefore perfectly valid in law and in equity. Hartley v. Russell, 2 Simons & Stuart, 244; Hartington v. Long, 2 Myl. & K. 590. To be sure, the grantees would be bound by the decree if one should be finally entered against the grantors. This because of the rule which the court applies for the maintenance of existing conditions and consequently of its jurisdiction to make an effective decree. The fact that the grant was made pendente lite has no other consequence. In earlier times the courts looked with disfavor upon a purchase pendente lite, not only because of its disturbance of the status quo, but also because it afforded an opportunity for maintenance and champerty. To avoid the first of these objections, the rule that the purchaser should be bound by the judgment was applied.

With respect to the subject of maintenance and champerty, the objection has lost much of its force, and is now only sustained upon a plain case. It is not sustained where the purchaser has an interest in the subject of the litigation, but only when he comes in as a volunteer, to assist the party from whom he buys. 6 Cyc. 865, where the subject is fullly treated and numerous authorities are cited in support of the rule just stated. After the transfer by the defendants, they, to the extent of the interest transferred, continued as representatives of the transferee as was said by Chief Justice Waite in Stout v. Lye, 103 U. S. 66, 26 L. Ed. 428, and repeated by Mr. Justice Brewer in Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 386, 14 Sup. Ct. 122, 37 L. Ed. 1113. Archer and the other creditors sought to obtain this security for their debt, and, if we look to ultimate justice, it would be more just that the debt of the real owner should be paid to his creditors, rather than that the fund should go to a stranger to that ownership. If the purchasers from the trustees would have no other means of protection, it would seem that they should have such a right as the trustees had. It was necessary that there should be purchasers, else the power of the trustees could not be executed. The title would not be marketable, and would remain stagnant in their hands. But we need not pursue this subject. It is enough that the original defendants are in due form before the court, and were injured by the decree. And it is of no concern whatever to the defendant in this bill what use the complainants make of the fruits of the decree, as, for instance, whether they shall thereby make good their own conveyance to their grantee. Counsel for defendants maintain in effect that, notwithstanding the original decree had the

effect to pass the title from the defendants to the complainant, no one was aggrieved thereby.

I have been induced to discuss these questions touching the interests of parties deriving such interests from one of the parties to the original suit, but who were not themselves parties because the case has been presented and argued as if such questions were open on a bill of review. It is only by such an assumption that the presence of the Smoky Mountain, etc., Company can be recognized; for its rights are only such as it has derived since the decree sought to be revived. Thus on both sides proofs have been introduced as if new issues could be raised and decided in this proceeding, a proposition which I doubt. There are some precedents cited by counsel wherein, as is claimed, such a broad jurisdiction has been exercised on a bill of review. But it seems manifest that this practice destroys the proper limitations of such a proceeding and confounds it with the proceedings of an ordinary suit in equity; and it is inconsistent with the equity practice of the federal courts. It is a singular circumstance that in this case the defense is made by a party who, under the rule referred to, could not properly be made a party to the proceeding at all. But proceeding, further, another objection is that:

> "A bill of review will not affect the title of a bona fide purchaser (of the property in controversy) from the successful party after a final decree and without notice that a bill of review is to be filed."

Now, whatever application such a rule may have to a bill filed to review a decree for error apparent on the face of it, it can have none to a case where the bill is filed on

account of newly discovered evidence of which the plaintiff in most cases would have no knowledge and no definite hope of discovery. Moreover, how is he to give notice of an intention to file such a bill? And to whom must the notice be given? How is he to know who is an intending purchaser? In this connection it may be worth while to remark that the original complainant lost no time in disposing of the lands to another after the decree of this court was entered. Only a few days elapsed after the decree before he had sold it, and it was conveyed before the time had elapsed for moving for a rehearing or applying for a certiorari. If in such circumstances a man may cut off the true owner by forthwith conveying away the property, then, as said by the Court of Appeals of Kentucky, a bill of review is of little value. Clark's Heirs v. Farrow, 10 B. Mon. 146, 151, 52 Am. Dec. 552. This point is made in the interest of the Smoky Mountain, etc., Company, which claims to be a bona fide purchaser. Admitting it to have that character, for the sake of argument, it would not suffice to defeat the claim of the complainants; for it never acquired the title to the property, and it is only in such case that a bona fide purchaser can have protection. 1 Story's Eq. Jur. § 64. The grant of the state of Tennessee conveyed no title, legal or equitable, and the grantor of the Smoky Mountain, etc., Company, had no title to sell and nothing passed by the deed. Non dat qui non habet is a maxim of the law, as well as sound logic. An apparent title is not always enough, as, for instance, when the name of the true owner has been forged, or the grantor was under a disability, or when, for any reason, the deed conveyed no title. The defendants in the former suit, who are complainants here, derived

the true title from the state of North Carolina. It was of a fee simple absolute, the highest and best title known to the law. The owner of property cannot be deprived of it without some fraud or fault on his part by a bona fide purchase of it by another from some other party than the owner. In 2 Pomeroy's Eq. Jur. § 735, the author says:

> "A subsequent holder, even for a valuable consideration and without notice, has certainly no higher right than a prior holder equally innocent and with an equally meritorious ownership. American courts seem sometimes to have acted upon exactly the opposite notion, and to have assumed that a subsequent title was necessarily the better one. When the original legal owner has done or omitted something by which it was made possible that his property should come into the hands of a bona fide holder by an apparently valid title, it may be just to regard him as estopped from asserting his ownership, and thus to protect the subsequent purchaser. But when the prior legal owner is wholly innocent, has done and omitted nothing, it certainly transcends, even if it does not violate, the principles of equity to sustain the claims of a subsequent and even bona fide purchaser."

And again, after an extended discussion of the subject, he says at the close of section 739:

> "The foregoing description shows that it is wholly unwarranted by the settled principles of equity for a court to sustain and enforce the subsequent legal estate acquired by A. in any kind of property or thing in action merely because he is a bona fide purchaser for a valuable consideration without notice against the prior legal and equally innocent owner, B., or even to sustain A.'s defense as a bona fide purchaser in a suit brought by B."

It seems to me that this doctrine rests upon a fundamental principle, and is indisputable. It has been rec-

ognized and enforced by the federal courts in several cases. Vattier v. Hinde, 7 Pet. 252, 8 L. Ed. 675; Boone v. Chiles, 10 Pet. 212, 9 L. Ed. 388; Smith v. Orton, 131 U. S. Appendix lxxviii, 18 L. Ed. 62; Texas Lumber Mfg. Co. v. Branch, 60 Fed. 201, 8 C. C. A. 562. Lindblom v. Rocks, 146 Fed. 660, 77 C. C. A. 86. Judge Gilbert, in this last case, puts the matter in a nutshell when he says:

> "The doctrine of bona fide purchaser without notice does not apply where the purchaser buys no title at all. His good faith cannot create title."

In the case of Texas Lumber Mfg. Co. v. Branch, supra, the deed to the bona fide purchaser for a valuable consideration stated that the grantors where the heirs of the deceased owner, and the purchaser supposed that to be so. But it turned out that another was the lawful heir, and the property was decreed to him. See, also, Latham v Barney (C. C.) 14 Fed. 133, 146. The doctrine concerning bona fide purchaser has been built up and has always rested upon the assumption that the purchaser paying value, has acquired a title, in the enjoyment of which a court of equity will protect him. At one time the court of chancery pressed the rule so far as to permit the purchaser to get hold of the title by seizing the evidence of it by any means in his power, even by trespass if he could. This excess was subsequently disallowed. But the requirement that the purchaser must have a title in order to enable him to call for the protection of the court has always continued to be regarded as an essential condition; and, indeed, upon sound reason, it must be so.

The cases of Rector v. Fitzgerald, 59 Fed. 808, 8 C. C. A. 277, and Ohio R. Co. v. Fisher, 115 Fed. 929, 53 C. C. A. 111, which are relied on by the defendants, decide

nothing opposed to this. In the first of these cases it appears from Judge Thayer's statement that the bona fide purchaser had acquired the legal title. And the references which Judge Thayer makes indicate that Rector had been seeking to defeat the title which defendant who was the grantor of the bona fide purchaser, had acquired, and to obtain a declaration that he was himself entitled to it. The case finally turned on the question of the laches of the plaintiff in filing his bill. The other case, that of Ohio River R. Co. v. Fisher, was not one of a bill of review, but it involved facts and proceedings occurring after an original decree and the filing of a bill of review. The railway company had become a purchaser for value through a sale and conveyance by the trustees under a will. The trustees held the legal title and the railway company had acquired it by their deed. Judge Simonton referred to the case of Bank v. Ritchie, 8 Pet. 146, 8 L. Ed. 890, where Chief Justice Marshall distinguished such a case from one where the title had not been acquired by the purchaser, at least that was the interpretation of it by the learned judge. The same observations apply to the case of Perkins v. Pfalzgraff, reported in 60 W. Va. 121, 53 S. E. 913.

The notion that, because at the time these lands were purchased of the complainant in the original suit he had obtained a judgment in his favor which precluded the defendant from asserting title to the lands, he might ever afterwards rely upon the estoppel by which the defendant was then bound, is unsound. On the contrary, the true rule is that, when the ground on which the estoppel of the judgment rests is removed and the truth is let in, the estoppel collapses and the structure built upon it falls to

the ground; whereupon there must be restitution of that which by the previous error of the court the party has been unjustly deprived of. 2 Foster's Federal Practice (4th Ed.) 1132; Mitford's Ch. Pl. 107, 89. Cases where judicial sales made in pursuance of decrees, and before the reversal of such decrees have been protected in the hands of purchasers at such sales, rest upon the security which must be afforded to the purchaser in relying upon the action of the court. It is necessary that the purchaser should have such confidence or sales could not be made for the proper value. Moreover, the price inures to the benefit of the true owner. What would be thought of such a case, if the court in addition to divesting the owner of his title should also deprive him of the proceeds? The rule itself results from a balance of inconveniences, the one which the owner suffers from a forced sale of his property and the other in depriving the purchaser of the necessary safeguard which the general interest of the public requires. Such cases have no application to an ordinary sale made after the court lets go its hold, and leaves the property to the ordinary incidents of business transactions. The distinction is stated by Gilfillan, C. J., in Lord v. Hawkins, 39 Minn., 73, 38 N. W., 689, as follows:

> "The second question in this case is, Does a purchaser in good faith from a successful party in a judgment determining the title to real estate come within the rule which protects a bona fide purchaser under a judicial sale; that is, a sale made pursuant to a judgment or to enforce a judgment, from the effect of a subsequent reversal or vacation of the judgment? The reason for the rule is obvious, and suggests the answer to the question. It is founded upon considerations of public policy, which require

that property shall not be sacrificed at sales that the law makes, that at such sales purchasers shall be encouraged to bid a fair price. And this cannot be effected if the title they acquire is subject to be defeated in consequence of errors or irregularities in the judgment under or pursuant to which the sale is made. This is no such case. Here was no sale nor anything equivalent to a sale. The judgment did not assume to pass any title. It passed on only the previously existing title like an action in trespass or ejectment. The appellant purchased from the party and took only the title that he had."

In 24 Cyc. 6, it is said:

"A sale is not a judicial sale, properly speaking, unless it is made under an order of the court, and subject to confirmation of the court [citing a number of cases]."

This distinction is highly important in the present case.

Another ground taken in defense, but not alluded to by the other judges, is that the bill of review is barred by a statute of limitations of the state of Tennessee which is as follows:

"No bill of review shall be brought, or a motion made therefor, except within three years from the time of pronouncing the decree; saving to infants, married women, persons of unsound mind, imprisoned or beyond the limits of the United States, a right to a bill of review within three years after such disability has been removed." Shannon's Code, § 4848.

I should suppose that this statute was intended to apply only to bills of review for errors appearing of record; for, if it be applicable to bills filed because of newly discovered evidence, the result would be that parties who have no knowledge of such evidence would be cut off at the end of three years, and many cases might arise where

the new evidence might not have been discovered before the period of this limitation should elapse, and yet be of such a character as to show that great injustice had been done. It has always been a favorite doctrine in courts of equity that the time for limiting recourse to those courts should begin when the cause of action is discovered, and some of the states have enacted statutes extending this rule to all cases whether at law or equity. But I am of opinion that, if it be conceded that this statute was meant to include all bills of review, it is not a law which binds the courts of the United States. It was enacted for the regulation of the procedure in the courts of the state. The legislature of the state had not the power to regulate the procedure of the courts of equity of the United States. Nor, indeed, has it the power by its own authority to regulate the procedure in any actions in the federal courts. Congress has power to adopt such legislation, and has done so in respect to actions at law. But the act expressly excludes suits in equity and in admiralty from the rules prescribed by state legislation for actions at law. Nor can a state prescribe a law which restricts the equitable jurisdiction of the federal courts. It may indirectly extend the jurisdiction of those courts by supplying new conditions wherein the federal courts, without departing from their own fundamental principles, may exercise equitable jurisdiction. The consequence of applying the statute of Tennessee to cases such as this would defeat the exercise of jurisdiction by the equity court of the United States in all cases of bill of review filed after three years from the original decree, although the courts of equity have hitherto and through a long period of time taken jurisdiction and decreed relief in many cases where

a much longer period had elapsed. And this further result would happen, that the power of the court existing in other states would be restricted in the state of Tennessee to a part only of its familiar jurisdiction. As we said in Kentucky Coal & Timber Co. v. Kentucky Union Co. (C. C. A.) 187 Fed. 948:

> "State statutes of limitation are prescribed for the tribunals of the state. They are not ex proprio vigore of any force in the courts of the United States. They may be, and in many instances have been, adopted by acts of Congress as laws of the United States. There is no general statute of limitations in the laws of the United States relating to suits in equity. But, speaking now of the equity courts of the United States, there has been, for the sake of conformity, a disposition to accept the statutory regulations of the states prescribing the time within which suits may be brought. And this practice has ripened into a rule which will be enforced whenever by observing it the court is not required to abrogate its own principles, in which case it will protect its own jurisdiction. Alsop v. Riker, 155 U. S. 488, 460 [15 Sup. Ct. 162, 39 L. Ed. 218]; Patterson v. Hewitt, 195 U. S. 309 [25 Sup. Ct. 35, 49 L. Ed. 214]. Instances are found where those courts have enforced the doctrine of laches in favor of defendants where the lapse of time has been shorter than that prescribed by state laws, but where the peculiar circumstances gave rise to an equity which the court was bound to protect. By the same token it would allow a longer period for bringing suit than that prescribed, when by fraud or concealment of the cause of action had not been discovered, or would not by reasonable diligence have been discovered."

This brings us to the last defense which the defendants make, which I think it material to notice. This is, that the complainants have been guilty of laches in taking measures to obtain leave to file the bill. There is no stat-

nte of the United States which limits the time for filing a bill of review. The general rule is that the party should move within a reasonable time after discovering the new evidence. It is a question of laches. In many cases it has been tested by the analogy of statutes fixing the time for taking an appeal from the original decree. But this has never been regarded as an absolute rule in applying the doctrine of laches. But, by whatever rule the matter is to be tested, I think there was in this case no such delay as should bar the remedy. The complainants were non-residents. They had an agent in Cherokee county, N. C., who had charge of lands they held in that state, and apparently of those in Tennessee. He testified that he first heard a rumor that the map had been found in February, 1906; that he at once set about verifying it; that in March of that year he obtained a copy of the map; that he tried to find out whether the field notes of the commissioners could be found at Nashville; that he made trips to Raleigh, N. C., and made thorough search of the state archives there, for the map, the report and the field notes of the North Carolina commissioners, which he hoped to find there, but failed to find them; that, when he had secured all that he could find, the matter was placed in the hands of local attorneys. The details of his search are stated more at length in his testimony. It appears that subsequently counsel at Cincinnati was employed to assist. The petition for leave to file the bill of review was filed by the counsel at Cincinnati, August 6, 1907. It does not appear that any change of conditions occurred meantime.

Reference is also made in the opinion of the majority of the court to the character of the appeal, and it is sug-

gested that it is the appeal of the "assignees." But I think, when construed by the whole record, it may properly be regarded as the appeal of the original parties. The privilege of prosecuting the suit in the court below would seem to carry with it the right to appeal if there should be occasion. As elsewhere said, the bill presented only a controversy to which the original defendants were parties plaintiff, and it is plain that that was the controversy intended to be removed to the appellate court. Evidently the parties have so understood it. There has been no motion to discuss the appeal, and it has been argued and submitted without any controversy on that point. This court has, instead of dismissing the appeal as it should have done if it was deemed fatally defective, entertained it, considered the case on its merits and now affirms the decree.

Restoration of the premises is, as I have said, an incident to the remedy. The remedy of the grantee of the baseless title in such a case would seem to be an action against his grantor to recover the consideration paid.

The proper order would be to reverse the decree of the Circuit Court, and to direct that the original decree be reversed, and the original bill dismissed, and for a restoration of the possession of the premises.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1911. No.

WILLIAM R. HOPKINS, BENJAMIN P. BOLE, EDWARD I. LEIGHTON, FRED. W. BRUCH, GEORGE REEVES AND JOHN MATTHEWS
Petitioners

VS.

CHARLES HEBARD, AND THE SMOKY MOUNTAIN LAND, LUMBER AND IMPROVEMENT COMPANY
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

BRIEF STATEMENT OF THE ISSUES

The chief difficulty in replying to petitioners' brief (and indeed, also, to their petition) consists in the fact that the whole of the same is an argument on the merits of the case, as petitioners believe them to be, as if the petition for *certiorari* had been granted and the case at issue. In fact, no sufficient reason is cited by petitioners, either in their brief or petition, that would justify this Court to grant a petition for *certiorari* to the Circuit Court of Appeals.

The present suit turned on questions of fact of importance only as between the parties, which questions of fact were found by the Master, the Circuit Court and the

Circuit Court of Appeals. Petitioners, both in their petition and brief, base their reasons, argument and many of their statements upon conclusions of facts contrary to those found by the Court.

In order to appreciate the issues in this case it will be necessary to set forth briefly certain material facts in the history of the case.

When the original case was at issue it was referred to Special Master Wright, whose report was submitted to the Circuit Court at Knoxville, Tenn., July 7, 1898.

On June 10, 1899, the Circuit Court at Knoxville, Tenn., adjudged and decreed that the title, to the lands in dispute, was valid in Charles Hebard, under whom respondent claims title, and that the title claimed by Belding *et al.*, under whom petitioners claim title to the lands in dispute, was void.

Upon appeal and hearing the Circuit Court of Appeals for the Sixth Circuit affirmed this decree, entered July 13, 1900, by said Court.

No motion or petition for writ of *certiorari* was made to this Court at that time as to this case and there was no right of appeal to this Court. The decree of July 13, 1900, above referred to, was a final decree by a proper Court. See U. S. Judicial Act, 1891, and also the case *Hugh Stevenson vs. William Fain et al.*, 195 U. S. 166, which was a suit of exactly like character, involving a part of the same State Line and decided in the United States Circuit Court of Appeals at Cincinnati.

After said final decree of the Circuit Court of Appeals for the Sixth Circuit, July 13, 1900, Charles Hebard conveyed the lands in dispute, together with other lands, to P. C. Blaisdell *et al.*, and said deed was dated July 16, 1900, was placed in *escrow* and was not delivered out of *escrow* until January 9, 1903. Later, P. C. Blaisdell *et al.* executed a deed for the said lands, including those in dispute, to the Smoky Mountain Land, Lumber & Improvement Company, the respondent in this case, which deed was dated

January 28, 1901, and also placed in *escrow* and not delivered to the Smoky Mountain Land, Lumber & Improvement Company until January 9, 1903.

And after said final decree of the Circuit Court of Appeals for the Sixth Circuit, July 13, 1900, petitioners under deed dated March 3, 1903, but executed as the acknowledgment shows, on June 5, 1903, became vested with the "title" of Belding *et al.* to the lands in dispute, as well as other lands, which deed purported to convey 65,000 acres in Graham County, N. C., and contains these significant words:

> "Subject, nevertheless, to all deductions, if any, arising by, through, or under 'State Line' suit hereinafter mentioned, grants No. 8100 for 16,800 acres and No. 2336 for 14,800 acres above mentioned being for the same lands."

And also the following clause:

> "But there is especially excepted from the covenants of this conveyance all those lands situated at or near the State line between the State of North Carolina and Tennessee, which were recovered in a certain action known as the State Line suit, which was pending in the United States Circuit Court for the Eastern District of Tennessee, and was brought by one Hebard against David W. Belding, and others, if future proceedings do not recover the title thereof."

It therefore appears that after the final decree of the Circuit Court of Appeals of July 13, 1900, without notice of bill of review, respondent purchased the lands in dispute from those claiming under Hebard, in whom it was declared by said final decree the title to the said lands was valid, and it further appears that petitioners purchased the claim of title to the lands in dispute, of those claiming under Belding, whose title was declared in said final decree to be void. It has never been asserted by petitioners that they paid any value whatever for the land which was in dispute in this

case, and with their knowledge of the final decree of July 13, 1900, and from the recitals in their deed, even had they done so, it would have been but a speculation and not as innocent purchasers.

On September 25, 1906 (over six years after the final decree of the Circuit Court of Appeals entered in the original case July 13, 1900), application by petition for leave to file bill of review was made by petitioners to the Circuit Court of Appeals for the Sixth Circuit, and leave was granted to file their petition for bill of review with the Circuit Court of Knoxville, Tenn.

On August 6, 1907, petitioners presented their petition for leave to file bill of review to the United States Circuit Court at Knoxville, Tenn., and leave to file bill of review was granted by the said Circuit Court, in an opinion by Judge CLARK, who had heard the original case. The Court in its decision upon petition and answer filed, said:

> "It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill of review might finally be expected. The objections which are made to permitting this bill to be filed go to the very merits of the bill, and can, and, in my opinion, should more properly be taken up by demurrer to the bill if filed. If, in the exercise of discretion I refuse to allow the bill of review to be filed, it is not certain that my refusal to do so would be subject to review. On the contrary, if the bill is filed and a demurrer should be sustained to it on the same grounds that are now urged against its filing, the action of the Court would be subject to easy review, and so the petitioners for review would suffer no error at the hands of this Court that could not be readily corrected.
>
> "In view of these considerations I have determined to allow the bill of review to be filed, subject, of course, to all legal objections, by demurrer, answer, plea, or otherwise, as the defendants may be advised and it is ordered accordingly."

Thereupon the bill of review was filed. On hearing upon bill of review in the said Circuit Court, the prayer of said bill was denied and the bill dismissed September, 1909, by the said Court in an opinion by Judge JOHN E. MCCALL, in the course of which opinion the Court said:

> "As indicated above, there are other grounds upon which the relief sought by the bill of review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence, if it had all been before the Court at the original hearing, would not have led the Court to a different conclusion than the one reached."

From appeal therefrom made to the Circuit Court of Appeals for the Sixth Circuit, the bill of review case came on to be heard in the said Circuit Court of Appeals on the 5th day of October, 1910, and on the 2d day of October, 1911, decree was entered in said case by the said Circuit Court of Appeals, again affirming the decree of the said Circuit Court. The decision in all these hearings turned upon questions of fact, and, as stated before, were important only as between the parties.

It now appears that petitioners seek to have reviewed by this Court a bill of review proceeding, which bill of review has been denied and dismissed by the Circuit Court and the Circuit Court of Appeals, and said Courts thereby refused to disturb their decrees.

We submit that in accordance with the principles laid down by this Court it would involve an entirely new departure by this Court to grant the petition of *certiorari* prayed for by the petitioners in this case.

Petitioners urge that this is a curious and anomalous case by reason of the fact that there is pending for hearing at the present time in this Court a case of original jurisdiction, brought by the State of North Carolina against the State of Tennessee, to decide the boundary line between the two States and involving the location of that portion of the said State Line which was originally in dispute in this case.

The decree of the United States Circuit Court of Appeals in this case is that the title to the lands in dispute is valid in Hebard, the party under whom respondent claims, and void as to Belding *et al.*, those under whom petitioners claim. Said decree cannot in any manner affect the decision or decree in the case of North Carolina vs. Tennessee, which issue is as to the jurisdiction and sovereignty of the States, nor can the decision as to the jurisdiction and sovereignty of the States, whatever it may be, ever affect the decree as to the parties in this suit.

The issue in this case is now *res adjudicata*, as to the parties, determining the title to the lands and not the jurisdiction and sovereignty of the States.

The United States Judiciary Act of 1891 enacts, *inter alia*, that the United States Circuit Court of Appeals shall be the final Court of Appeals, for all suits between parties claiming under grants of different States, and as it necessarily follows in a suit arising between parties, claiming under grants of different States, that the State boundary would be involved, there can be no question that a case such as this was in the mind of Congress when it passed the Act referred to, and it does not appear that anyone except petitioners have ever regarded this as anomalous. The deductions suggested by petitioners that the fact of the decision by the United States Supreme Court in the case pending in this Court referred to, to wit: North Carolina vs. Tennessee, if said Court should decide that the line was located as contended for by petitioners, would be to reinvest title to the lands in dispute in the State of North Carolina, we submit is not worthy of serious discussion. The State of North Carolina has granted these lands and these grants must always be superior to any junior grants *per se*, and we do not regard that this Court will consider the statement as sound reasoning.

Surely the decree of the Circuit Court of Appeals declaring that the superior title under the laws of North Carolina is void as to the title of respondent, would not enable

an inferior title under the laws of North Carolina to prevail. The State of North Carolina having by solemn grant conveyed the title it claimed to have, would under the laws of North Carolina as well as every other State, have nothing to convey by purported junior grants. In any event, the position of the party claiming under junior grants of the State of North Carolina, or the possibility that such an event might happen, we submit would not be a reason for granting a petition of *certiorari* as prayed for by petitioners.

We submit further that this question has already been decided by this Court in the case referred to between the State of North Carolina and the State of Tennessee in the Supreme Court of the United States, October Term, 1908, numbered 13 originally. In that case the Babcock Lumber & Land Company, claiming to have succeeded to the title of respondent, filed a petition praying for leave to intervene in the case, in May, 1909, on the ground that their title, which had been adjudged to be in Hebard—ancestor in title of respondents—would be affected by an adjudication in the case between North Carolina and Tennessee if it should be found that the lands which it had purchased from the respondent were in the State of North Carolina instead of the State of Tennessee. To this petition the State of North Carolina answered, denying the right of the Babcock Lumber & Land Company to intervene in the case, on the ground that the rights of the Babcock Lumber & Land Company could not be prejudiced by a decree of a boundary line between the States, although that decree might put the land in controversy under the jurisdiction and sovereignty of the State of North Carolina, because the issue in the suit in this Court between North Carolina and Tennessee was for the purpose only of establishing a boundary line, and would affect only the question of jurisdiction and sovereignty of the States, and not affect the private titles of individuals or decrees theretofore made. And the said State of North Carolina did set up in the paper filed in that suit—by its counsel, who are of counsel

in this petition filed for this *certiorari*—called a brief for complainant, meaning the State of North Carolina, in opposition to the motion of the Babcock Lumber & Land Company for leave to file petition to intervene and become a party defendant in this case, that

> "The subject matter of this controversy is a state line. Nobody is interested in that subject matter except the two states. The direct consequences of fixing the line affecting private interests do not concern the states. They are property rights to be settled between private parties in some other manner."
>
> "In *Fowler vs. Lindsey*, 3rd Dallas 411—which was a suit in ejectment arising out of the fact that a state line between Connecticut and New York had never been authoritatively settled—the State of New York tried to intervene and this Court held that a decision as to the right of soil between individual citizens can never affect the right of the State as to the soil or jurisdiction."
>
> "Afterwards, in the case of New York against the State of Connecticut, 4th Dallas 1, the State of New York tried to enjoin the prosecution of suits depending on that state line location and this Court denied the right of the State to interfere in the matter in any way, on the same ground, to wit: that it was not the party in interest, nor affected in any way by any litigation between private parties. The rule certainly works both ways."

The case of Fowler vs. Lindsey even goes further in settling the question raised by the petitioners for this *certiorari*, for, in rendering the opinion of the Supreme Court of the United States, WASHINGTON, Justice, says:

> "It is not sufficient that a state may be consequently affected, for in such case (where the grants of different states are brought into litigation) the Circuit Court has clearly a jurisdiction; and this remark furnishes an answer to the suggestions that have been found on the remote interest of the state in making retribution to her grantees upon the event of an eviction.

> "It is not contended that the states are nominally the parties, nor do I think that they can be regarded as substantially the parties to the suits; nay, it appears to me that they are not even interested or affected. They have a right either to the soil or to the jurisdiction. If they have the right of soil they may contest it at any time in this court, notwithstanding a decision in the present suits and though they may have parted with the right of soil, still the right of jurisdiction is unimpaired. A decision as to the former object between individual citizens can never affect the right of the state as to the latter object; it is *res inter alios acta.*"

Justice CUSHING, filing an opinion in this case of Fowler vs. Lindsey, says:

> "Whether the land lies in New York or Connecticut does not appear to affect the right or title to the land in question. The right of jurisdiction and the right of soil may depend upon different words, charters and foundations. A decision of that issue can only determine the controversy as between the private citizens who are parties to the suit, and the event only give the land to the plaintiff or defendant, but could have no controlling influence over the line of jurisdiction."

The application by the Babcock Lumber & Land Company to intervene, in the suit pending in this Court between North Carolina and Tennessee, dwelt upon in the petition for this *certiorari*, was refused by this Court. While not filing any opinion, it is evident that the refusal by this Court of the petition of the Babcock Lumber & Land Company for intervention was made on the ground that the Babcock Lumber & Land Company would not be affected or interested in the litigation and decree therein between the two States to establish the boundary line.

In other words, the boundary line between two States may be passed upon by a Circuit Court in determining the rights of individuals, but the decision of a Circuit Court in

determining the rights of individuals, by locating a boundary line between States, does not prevent nor affect the right of this Court to relocate or find a boundary line between the two States for jurisdiction purposes. The only effect—which a decree in the case pending in this Court, between North Carolina and Tennessee, finding a different boundary line than the one established in the case in the Circuit Court, for which this petition is filed for a *certiorari*, would be that if the lands adjudged to belong to the respondents were found by a decree in this Court—establishing a different boundary line—to be in North Carolina that they would pay taxes to North Carolina and be subject to the jurisdiction of North Carolina in all police regulations and law; but it would not affect the rights adjudicated in this case by the Circuit Court.

It is true that Charles Hebard claimed under grants from the State of Tennessee, and that Belding *et al.*, defendant in the original suit, claimed under grants from the State of North Carolina, but it is also true that the Smoky Mountain Land, Lumber & Improvement Company, in addition to the title which was vested in Charles Hebard prior to 1898, claims under the decree of the said Circuit Court at Knoxville, Tenn., of June 10, 1899, as affirmed by the Circuit Court of Appeals of July 13, 1900.

If there ever was any virtue in the statement and argument of petitioners as stated in their brief and petition, we submit that when the same should have been urged, if at all, was within one year from July 13, 1900, and not twelve years afterward.

THE LAW AND PRACTICE GOVERNING WRITS OF CERTIORARI

There is not present in this case any question of gravity and no new principle of law of any importance to the public, nor is there any conflict of decisions between Federal

Courts or between Federal Court and a State Court, and there is no question of international law affecting the nation.

It is evident that the petitioners seek to persuade the Court to review the decree upon the correctness of facts found by the inferior Courts, the soundness of which depended upon their judgment. For this Court to grant this petition would involve an entirely new departure from the principles laid down by this Court. The decisions of this Court have been so clear and uniform as to when it will or will not grant petition of *certiorari* that it is probably unnecessary to quote any authorities to the Court. This Court should not issue a writ of *certiorari* for the purpose of reviewing findings of fact.

We submit that this case was decided by the Master and twice by the Circuit Court and twice by the Circuit Court of Appeals under rules of law and equity that have been well settled for many years in the Courts of the United States, and that the mass of evidence taken and the care shown in the various written opinions of the Court, show unusual opportunity to both the Circuit Court and the Circuit Court of Appeals of reaching a just decision.

The principles which govern the exercise of this Court's authority to issue a writ of *certiorari* are very clearly set forth in the case of *Fields vs. United States*, 205 U. S., page 292-296 (1907), from which we quote as follows:

> "In this case there is no sufficient ground for a *certiorari*. The application comes within none of the conditions therefore declared in the decisions of this Court. However important the case may be to the applicant, the question is not one of gravity and general importance. There is no conflict between the decisions of the State and Federal Courts or between those of Federal Courts of different Circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public."

In *American Construction Co. vs. Jacksonville Railway*, 148 U. S. 372, 382 (1892), the Court states:

> "The act has uniformly been so construed and applied by this Court as to promote its general purpose of lessening the burden of litigation in this Court, transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals, and making the judgments of that Court final, except in extraordinary cases."

The Court also defines the class of cases in which the writ may be allowed, in *Forsyth vs. Hammond*, 166 U. S. 506, 514 (1897), in which the Court declares that the power of the Court in *certiorari*—

> "is a power which will be sparingly exercised, and only when circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

We consider it unnecessary to impose upon the Court quotations of any further authorities as to when this Court deems it proper to grant a petition for writ of *certiorari*, especially as all the decisions of this Court are in accord with the cases above quoted, and we submit that the principles therein declared will not allow the Court to grant the petitioners' prayer for a writ of *certiorari* to the Circuit Court of Appeals in this case.

Notwithstanding the fact that the Special Master, the Circuit Court and the Circuit Court of Appeals in the original case found in favor of the contentions as to the location of the State Line, of the plaintiff, Charles Hebard, under whom the respondent claims title to the lands in dispute, and notwithstanding the further fact that upon Bill of Review, Judge CLARK, of the Circuit Court, who had

heard the original case, in his opinion allowing the Bill of Review to be filed, stated: "It does seem, upon examination of this case, that there is no ground on which the success of the proposed bill of review might finally be expected;" and in effect saying that he merely allowed the Bill of Review to be filed in order that the petitioners might have opportunity, should they suffer error at his hand, of making an appeal to the Circuit Court of Appeals, which they would not have if he refused to allow the bill to be filed; and notwithstanding further that upon hearing of said bill of review by the Circuit Court, the Court, in an opinion by Judge JOHN E. MCCALL said, *inter alia:*

> "As indicated above, there are other grounds upon which the relief sought by the bill of review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence, if it had all been before the Court at the original hearing would not have led the Court to a different conclusion than the one reached."

And also, notwithstanding that the Circuit Court of Appeals, upon hearing of an appeal from the said decree of the Circuit Court, affirmed the same and dismissed the bill, petitioners lay great stress on the "grave doubts" of the different Courts as to what their decision should be.

We call this Court's attention to Special Master Wright's report, wherein he finds, *inter alia:*

> "After a careful consideration of the whole case, I am of the opinion, and so report that the line between the States of Tennessee and North Carolina from the Little Tennessee River to the Junction of the Hangover and Fodder Stack Ridges, as run and located by the Commissioners of said States, in 1821, and confirmed by the respective legislatures of said States, crosses the Little Tennessee at a point where it reaches the river on the northeast side, and from the river runs up the Hangover lead, as shown on complainant's map, and along the extreme heights of this ridge, passing the black or red oak, Slick Rock Gap, Cold Spring

> Knob, Big Flat Knob, Hangover, Haoe, Grassy Gap, and Stratton Bald to the junction of Hangover with Fodder Stack."

and also the opinion of Judge CLARK of the Circuit Court at Knoxville, in his opinion in the original case June 10, 1899:

> "It must not be forgotten, however, that the Commissioners in surveying and marking the line, followed the mountain range down to the Tennessee River, and that according to the calls actually made, they would cross that river and proceed along the mountain crest where complainants contend the line is. It was the crest of this same mountain range which brought them to the river, and it was the obvious and conspicuous range to have followed by directly crossing the river and keeping up the previous course. It is extremely difficult to believe that the Commissioners at this point would have dropped down the river for half a mile and then followed Slick Rock Creek for a distance of five or six miles without ever making the slightest reference to this water stream. Granting as argued that the creek may, at that time have had no name whatever, nevertheless it would have been so natural and so necessary to avoid misleading, for the Commissioners to have said that they changed their course, and instead of going directly across the river went down and then followed a creek or water stream up the valley and then to the ridge which led out to the junction; that it is next to impossible to think that such a deviation as this would have been made without a word to give any indication of the fact. Following the calls as actually given, it would be impossible to run this line as claimed by the defendants."

And also the decision of the Circuit Court of Appeals, expressed in the opinion of Mr. Justice LURTON, wherein he states *inter alia* as follows:

> "The significance of these trees as marking the State line is also affected by the fact that other trees similarly marked are found on the Fodder Stack ridge,

which, confessedly, are not upon any line now claimed as the actually located State line. The surveyors who testify to such trees express the opinion that they were marked to designate Indian trails. As this whole region was the habitat of the Cherokee Indians at the time of this survey in 1821, it is altogether possible that all of this marking was done by the Indians as mere trail marks, or in a spirit of imitation, though the stronger probability is that it was tentatively marked and then abandoned for the Hangover line, as the one indicated by the Cession Act, and the report made accordingly."

And also:

"The marked trees on this line are shown by blocking to have been probably made in 1821, and correspond in appearance to those existing in the undisputed line. They are strangely scattered along the line claimed. About one-half of the whole number are found within one and one-half miles of the mouth of the creek. Then for a distance of three and one-half miles not a marked tree is shown, though the line is still in the valley, where there was and is a great abundance of timber. Then where the line is claimed to have left the creek, there are found a great number of marked trees within a short distance after staring up a spur leading to the Fodder Stack, but from the junction of this spur with the Fodder Stack to the Hangover, only two or three trees are found. It is most difficult to account for this line of marked trees, irregularly as they are grouped. The probabilities are that they were marked by the Commission."

"For what purpose, is the question. Their evidential value as establishing the actual State line is greatly impaired by the following circumstances:

"1. The line thus marked is not upon the course which is called for by the survey as reported and adopted.

"2. It departs from the line of the 'main ridge' called for in the Commissioners' survey, and a natural

monument of the utmost significance. When a monument natural or artificial is called for, and its identity is doubtful, great importance may be properly attached to an actually marked line upon the ground.

"But in this instance there was no reasonable doubt as to the identity of the 'main ridge' called for in the Commissioners' survey.

"The greater altitude of the Hangover ridge, as well as its general course, makes it most clear that there could have been no difficulty in determining that the Hangover and not the Fodder Stack was the 'main ridge.'

"It is, therefore, not a case of ambiguous calls or doubt as to the identity of a natural monument in the description. The indisputable facts that the Hangover is much the greater in elevation, was in the direct course called for by the Cession Act, and was indicated by the chops on the established monument on the north side of the river, leaves no reason for supposing that the commission mistook the Fodder Stack ridge as the 'main ridge' and undertook to reach it by a line up the creek.

"3. If we adopt the Slick Rock Creek line, we must believe that the Commissioners not only turned down the river at an acute angle from the course they had been following, followed the river for half a mile and yet made no call in their report which would indicate such a departure, or that the river was made the boundary for any part of the line.

"4. We must also believe that instead of following a mountain boundary, which, according to the Cession Act, ran with the summits of the highest mountains, they deliberately abandoned the heights of the mountain ranges and followed a water course from its mouth for seven miles, and yet made no mention of this natural object in their report whatever."

And upon reading these excerpts or the full opinions themselves, we think this Court will have no doubt whatever as to the certainty existing in the mind of the said Courts that their final conclusions and decisions were proper

and just in reaching a full determination of the rights of the parties.

Petitioners in their brief, under the history of the case, "Facts" and "Points of Law," state deductions and make arguments on fact and law as if this case were being heard by this Court upon direct appeal from the Circuit Court of Appeals. The argument by petitioners upon the merits of the case, if it were allowable, would make it possible to bring every case into the Supreme Court of the United States and have the merits reviewed under the disguise of a writ of *certiorari*.

Respondent is advised that the allegations and arguments of petitioners upon the merits of this case has nothing whatever to do with the issue before this Court as to the granting or not granting of a writ of *certiorari*. Petitioners in their brief also profess to set forth the legal defences urged by respondent in the bill of review proceedings, and petitioners proceed in their brief to reply to such defences. The essential facts commented upon in the course of petitioners' brief and petition are contrary to those found by the Circuit Court and the Circuit Court of Appeals. Many of the decisions cited by petitioners in reply to the legal defences of respondent are well construed decisions, sound in principle as applied to the specific case quoted from, but are not applicable to this case. The error of petitioners lies in their failure or unwillingness to see that which is plainly pointed out by the Courts below, to wit: that the essential facts claimed by petitioners are not the facts as shown by the evidence and found by the Courts, and that none of the equitable doctrines cited by petitioners can avail upon the facts as found by the Court.

Respondent does not wish to impose upon the Court a long brief arguing upon the merits, which is not the issue upon petition for *certiorari*, and such reply as is here made to the "Facts" and "Points of Law," by respondent is merely an endeavor to be somewhat responsive to petitioners' brief.

GENERAL REPLY TO PETITIONERS' BRIEF ON FACTS

The brief of petitioners, and also the petition, indicates that portion of the State line in dispute began at the sixty-fourth mile tree, which is not correct. The record and the evidence will show that the State Line in dispute was undisputed down to the very north bank of the Tennessee River, about midway between the sixty-fourth and sixty-fifth mile trees, where stood a fore and aft State Line tree directly opposite the point where respondent, and those under whom they claim, contend that the State Line crossed the Tennessee River to the Hangover Ridge.

Judge LURTON in his opinion in the original case, states that

> "the line to the Tennessee River is undisputed and is not here involved. The point where the Commissioners' line reaches the Tennessee River is one of the fixed and settled questions on this record. The line on the northeast side of the river is well located, and a fore-and-aft state line pine tree is standing very near the bank of the river. * * * He (the Master) also reports that the parties agreed before him that the line was well established to that tree."

As will appear from the evidence on the record it was found by the Master and the Circuit Court and the Circuit Court of Appeals as a fact that the line over Hangover Ridge (the "line" claimed by respondents and those under whom they claim) was the true State line, and that located on said line are State line trees marked as such in 1821. It was also found as a fact, as set forth in all the opinions, that the Hangover Ridge is the "main ridge." That the Cession Act and the confirmatory acts of 1821 enacted by the respective States, according to their language and descriptions, located the State Line between the States at the point in dispute on the Hangover Ridge. That it was recognized by the Master, the Circuit Court and the Circuit

Court of Appeals that the surveyors in marking the State Line in 1821 probably did survey up Slick Rock Creek, but such line under all the evidence was a tentative line and was not adopted by the Commissioners, for the reason that the line up Slick Rock Creek would not conform to the words of the Cession Act of 1789, nor the words of the Confirmatory Acts of 1821, which purported to be a ratification of the Reports of the Commissioners.

Therefore, it appears in the opinions of the Master, the Circuit Court and the Circuit Court of Appeals, that though they admitted that the surveyors of 1821 surveyed and marked a line up Slick Rock Creek, that under the language of the confirmatory acts of the States and the Cession Act, the Commissioners never adopted such line, and that the only line that would conform to the words of said acts was the line over the Hangover contended for by those under whom respondent claims.

Judge LURTON, in his opinion, says:

> "Returning to the line as located by the joint commission, we find the next call, after striking the Tennessee river, is in these words: 'From Tennessee river to the main ridge and along the extreme height of the same to the place where it is called the "Unicoy" or "Unaka" Mountain. Just here it may be observed that the Unicoy or Unaka Mountain is about 15 miles in a southwesterly course from the junction of the two ridges spoken of heretofore. How did the commissioners locate the line between the Tennessee river and the Unaka Mountain? It is to be borne in mind that their authority was to "settle, run, and re-mark" the line "agreeably" to the cession act. The Tennessee river was a water course, which cut a deep gorge through the main mountain range which the line was following between the Smoky and the Unicoy Mountain. The cession act placed the boundary "along the extreme height of said mountain (that is, the Great Smoky) to the place where it is called "Unicoy" or "Unaka" Mountain.' It was the duty of the commissioners to locate the line 'agreeably' to this call. They

had been following the extreme height of the ridge between the Smoky and the Tennessee River. The river cut through the ridge by a deep gorge, the mountain on either side gradually lowering, and terminating at the river in a bluff. The last monument on the northeastern side is a tree marked as a fore and aft tree. A fore and aft tree is a tree in the line, and the chops are on the sides showing the direction of the line. The chops on this tree indicated that the line there crossed the river. The general course of the line, as called for by the call which brought the line to the river, was southwesterly, and this course was to be continued to the Unaka. The course would, therefore, require the line to there cross the river, as also indicated by the chops on the tree. The general direction of the cession act would keep the line on the extreme height of the mountain ridge or range. Immediately across the river, and in the general course of the line, was the Hangover ridge * * * . The Master reports that the Hangover ridge was the main or highest ridge, having an average height of 800 feet greater than the Fodder Stack."

And at the beginning of Judge LURTON's opinion, he says:

"The intention of the North Carolina cession act of 1789 was to make the crest of the great mountain ranges extending across the State of North Carolina in a southwestwardly direction the boundary line of the ceded territory. This is most evident from even a casual reading of the boundary line therein described. The Painted Rock on the French Broad river is a natural monument of great notoriety. From that point the calls in the cession act are, 'Thence along the highest ridge of said mountain to the place where it is called the "Great Iron" or "Smoky" Mountain; thence along the main ridge of said mountain to the place where it is called "Unicoy" or "Unaka" Mountain, between the Indian towns of Cowee and Old Chota.' The part of the great mountain range called 'Smoky Mountain' is well known, as is also that part of the same range southwest of Smoky Mountain called 'Unicoy' or 'Unaka' Mountain. There is

> no trouble about the location of these two great natural monuments in the line. The distance between the two is not less than 50 miles, and the only call which is locative of the line between the two is that the line is to run along 'the extreme height of the said range, theretofore called the "Great Iron" or "Smoky" Mountain, to that part of the range or ridge called the "Unicoy" or "unaka" Mountain.' The commissioners representing the two states were not authorized to agree upon a new boundary, but to 'settle, run and remark the boundary line * * * agreeably to the true intent and meaning' of the said cession act of 1789. It was clearly their duty to run and mark a line between the Great Smoky and Unaka Mountains 'following the extreme height' of the mountain range connecting these two prominent points."

It will be noted that in the original case the only evidence of the report of the Commissioners was the description contained in the "Confirmatory Acts", which purported to quote the words of the report of the Commissioners. The original report of the Commissioners of 1821 had not been found and was not in evidence.

Petitioners based their bill of review proceedings on the purported "newly discovered map of 1821" *and respondent filed the newly discovered report of the Commissioners of* 1821. It will be observed that as to the descriptions of the line in dispute, the original report of the Commissioners thus placed in evidence *is verbatim the same* as the "Confirmatory Acts", which acts were before the Master and the Courts in the original case. Therefore, the conclusion of the Master and the Courts below in the original case, to wit: *that the only line that would conform to the Cession Act and the Confirmatory Acts of the respective States was the line over the Hangover,* is confirmed and not disturbed by the fact that the original report of the Commissioners of 1821 contains *verbatim* the same description as that set forth in the Confirmatory Acts, which they had construed.

The report of the Commissioners, the Confirmatory Acts of the respective States, and the newly discovered map make no reference whatever to any field notes—that is, courses and distances. Further, the newly discovered map *as a picture or sketch map* conforms to the words of the Report of the Commissioners, the Confirmatory Acts and the Cession Act and conforms to the "line" over the Hangover.

Petitioners in the Courts below sought to accept the map as independent of the Cession Act and the Report of the Commissioners and the Confirmatory Acts of the States, and endeavored to point out certain features of the map which they claimed to be in their favor and at the same time, to reject the map as incorrect where plainly it did not conform to their contentions.

Judge McCALL heard the case upon bill of review in the Circuit Court, and in his opinion states as follows:

> "Upon an examination of the newly discovered map, it appears that the State line crosses the Little Tennessee River at right angles, and at the point where the line first reaches the river, and that it proceeds in a southwesterly direction along the ridge, lying adjacent to and immediately south of the river, towards the Unicoy Mountains. There is a black line upon the newly discovered map, marked "creek" which forms a junction with the Tennessee River a short distance above where the line crosses the river, and east of the line. But there is no indication upon the map, nor in the report accompanying it that this line ran up said creek for any distance, or that it touches the creek at any point. Indeed, if the line followed either the river or creek for any distance, that facts is not indicated upon the map, nor is there any reference to such thing in the Commissioner's report.
>
> "In order that the map or the report of the Commissioners be of any service to the petitioners, it should show that the State line, after crossing the river followed Slick Rock Creek, if, indeed, it be Slick Rock Creek that is indicated on the map, to a junction with

Little Fodder Stack. From the location of this stream marked 'Creek' on the map, considered in the light of all the evidence in the case, I am inclined to the opinion that it is Cheoah River, and not Slick Rock Creek.

"The map and the report upon their faces failing to shed any new light upon the issues in the original case, let us examine the evidence taken upon the issues under the bill of review.

"Here we are met with the testimony of witnesses seemingly of equal credibility and of equal opportunity to know the facts about which they testify that is contradictory and unreconcilable. Instead of elucidating the newly found map, it tends to confuse that which appears upon the face of the map, and also it is confusing in its relation to the evidence and findings in the original case.

"Indeed, if this map sheds any additional light upon the issues, it is to make clearer and more certain the correctness of the conclusion reached in the original case, now under review.

"An examination of the Commissioner's map, discloses that the State line approaches the north bank of the Little Tennessee River, running in a southwesterly direction, crosses it at right angles, leaving the south margin of the river in a southwesterly direction immediately at the point of crossing, and runs along the crest of a ridge toward Unaka Mountain, and in this particular follows the direction of the Cession Act, from the Smoky to the Unaka Mountains, wherein it is provided as follows: 'Thence along the extreme height of the said mountain to the place where it is called Unicoy, or Unaka Mountain.'

"The report of the Commissioners and the Confirmatory Acts of the North Carolina and the Tennessee Legislatures all use identical language in describing this line from the Tennessee River, to wit: 'From the Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unicoy or Unaka Mountain.'

"This is the course and location given the State line by the final decree in the original case. There is nothing in the newly discovered evidence to warrant this Court in holding that had it been before the Court

at the original hearing, a different conclusion would have been reached, but, on the other hand, the newly discovered evidence rather tends to strengthen the correctness of the original decree.

"It would require a far stretch of the imagination to hold that the newly discovered map, which is silent on this point, except the use of the word 'creek' is sufficient to warrant the Court to reverse the holding in the original case, and write upon the face of the map, and into the Commissioners' report, according to the showing on the Burns Map, the words: 'Thence along the North bank of the Tennessee River to the mouth of Slick Rock Creek. Thence westerly up said creek with its meanderings about five miles to Little Fodder Stack lead; thence along the extreme height of Little Fodder Stack to Big Fodder Stack; thence along the crest of Big Fodder Stack to its junction with Hangover.' Yet this, in substance, must be done, if the petitioners are granted the relief sought by their bill of review.

"As indicated above, there are other grounds upon which the relief sought by the bill of review should be denied, but I prefer to base my action upon the ground that the newly discovered evidence, if it had all been before the Court at the original hearing would not have led the Court to a different conclusion than the one reached."

Petitioners state that in 1836 Tennessee caused the lands ceded to her to be surveyed and sectionized and platted to Slick Rock Creek, "recognizing it as the line." The facts are as follows:

By the Act of Tennessee, 1836, Chapter 2, Section 10, a surveyor's district, known as the Ocoee District, was established, and was surveyed by the surveyor of that district who for some reason unknown, but probably by reason of the difficulty of the work, stopped at Slick Rock Creek, as to sectionizing lands on his plat. These facts were all before the Master and the Court in the original case, Belding vs. Hebard. As will further appear, the State of Tennessee never recognized by any Acts, that the boundary

line between Tennessee and North Carolina was Slick Rock Creek.

The Act of Tennessee of 1854, Chapter 22, declares that all lands in the Ocoee District, *whether surveyed or not, and whether on the plat of the office of the Surveyor of the Ocoee District or not*, should be granted upon certain procedures therein set forth in detail. Thus the State of Tennessee by said Act set forth her claim of right to the lands now in dispute, from which claim she has never receded, and has never acquiesced in any claims of North Carolina as to this land in dispute or as to parties claiming under North Carolina.

The very land in dispute was and is the only land in the Ocoee District not sectionized prior to 1854, under the evidence in this case.

The significance of this Act of Tennessee of 1854 is apparent when it is recognized, as the record shows, that all grants for lands by the State of North Carolina anywhere in the vicinity of the State Line here in dispute, were subsequent to 1853. It is also significant that the said Act of Tennessee of 1854 declares that all lands in the Ocoee District, whether surveyed or not, and indicates that some of the lands of the Ocoee District had not been surveyed *and the only land* ever claimed by Tennessee or parties claiming under Tennessee, in the Ocoee District, which had not been sectionized, as far as in evidence, *is the land which was in dispute in this case.*

The statement of petitioners that

> "afterward the case came on regularly for hearing and was submitted to the Circuit Court of Appeals and was under consideration; merely by an accident an authenticated copy, or possibly the original of the field notes of Davenport, one of the original surveyors in 1821 of the line who accompanied the joint commission were discovered in an old Secretary by the descendants of the said Davenport in the home of said Davenport which were duly authenticated, and an application was made to the Circuit Court of Appeals

> suggesting a diminution of the record and asking leave to put in these field notes which in every way corroberated the Slick Rock line; that application with additional testimony proving the authenticity of the notes and what they proved was refused,"

is not a full and correct statement.

The evidence submitted by petitioners and respondent to the Circuit Court of Appeals shows there was no authenticated copy of any field notes of Davenport (surveyor for the State of North Carolina on the survey of 1821), and it appears by said evidence that these notes were not original field notes of Davenport or anyone else, and it clearly appears by said evidence that it is unknown what notes said field notes were copied from.

The motion of petitioners to the Circuit Court of Appeals, suggesting that the record be remitted to the Circuit Court at Knoxville to admit evidence of these field notes was denied by said Circuit Court of Appeals on May 11, 1911.

GENERAL REPLY TO PETITIONERS' BRIEF ON "POINTS OF LAW"

Petitioners quote authorities at length on the point that even though they were assignees, if aggrieved by the final decree, they are proper parties to file a bill of review. We are not concerned with the technical consideration as we would be if petitioners were aggrieved by the final decree in the original case of Belding vs. Hebard. The fact is that petitioners are not and never were aggrieved by the said final decree. The legal position taken by respondent was that petitioners not being aggrieved by the decree complained of, could not prevail upon proceedings for the reversal of that decree.

The Circuit Court of Appeals, upon bill of review proceedings, in their decision rendered October 2, 1911, found that respondent was an innocent purchaser for value after

final decree, and that petitioners were only concerned as having made a speculative purchase, and the case presented to the equitable discretion of the Court was not one which would allow the Court to review a decree upon the grounds sought.

This finding of the Circuit Court of Appeals in the judgment of the said Court, as expressed in their opinion, was controlling, and made it unnecessary for the Court to consider any other legal defences or the merits of the newly discovered evidence.

In conclusion, it is submitted that the petitioners wholly fail to show any reasons for granting a petition for *certiorari*. Petitioners also fail to show any contention whatever that exists or would be decided by review of this case by this Court, except the contentions existing between the petitioners and respondent, which have already been adjudicated by a Court of final jurisdiction under the law.

We submit that the writ should be denied.

Respectfully submitted,

JOHN FRANKLIN SHIELDS
WILLIAM A. STONE
T. E. H. McCROSKEY
Counsel for Respondent